

ASSEMBLY BILL

No. 1638

Introduced by Assembly Member Nava

February 22, 2005

An act to amend Section 366.26 of the Welfare and Institutions Code, relating to adoption.

LEGISLATIVE COUNSEL'S DIGEST

AB 1638, as introduced, Nava. Adoption of dependent children.

Under existing law, in proceedings for the adoption of a child who is a dependent of the juvenile court, the person preparing the adoption report may be called and examined by any party to the proceeding.

This bill would provide that if a petition to adopt has been filed, or if adoption is part of the permanent plan for a child, the court shall receive reports on the progress of adoptions at no less than 6 month intervals, beginning with the entry of the order terminating parental rights. If the petition is from the foster parent who has had custody of the child and functioned satisfactorily as a de facto parent for more than one year, and the petition is not opposed by the child or the State Department of Social Services, it shall be granted within 90 days of the exhaustion of the appellate rights of parents, or the department shall show cause why the petition approval shall not be granted.

Existing law provides that, with the consent of the licensed adoption agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

This bill would delete that provision, and provide instead that the court shall have continuing jurisdiction in the best interests of the child until a petition for adoption has been granted and shall ensure representation for the child until adoption is finalized or other permanent placement disposition is final. By increasing the duty of

counties to provide legal representation in juvenile cases, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. This act shall be known and may be cited as
2 “The Abused Child Adoption Facilitation Act of 2005.”

3 SEC. 2. Section 366.26 of the Welfare and Institutions Code
4 is amended to read:

5 366.26. (a) This section applies to children who are adjudged
6 dependent children of the juvenile court pursuant to subdivision
7 (c) of Section 360. The procedures specified herein are the
8 exclusive procedures for conducting these hearings; Part 2
9 (commencing with Section 3020) of Division 8 of the Family
10 Code is not applicable to these proceedings. Section 8714.7 of
11 the Family Code is applicable and available to all dependent
12 children meeting the requirements of that section, if the
13 postadoption contact agreement has been entered into
14 voluntarily. For children who are adjudged dependent children of
15 the juvenile court pursuant to subdivision (c) of Section 360, this
16 section and Sections 8604, 8605, 8606, and 8700 of the Family
17 Code and Chapter 5 (commencing with Section 7660) of Part 3
18 of Division 12 of the Family Code specify the exclusive
19 procedures for permanently terminating parental rights with
20 regard to, or establishing legal guardianship of, the child while
21 the child is a dependent child of the juvenile court.

22 (b) At the hearing, that shall be held in juvenile court for all
23 children who are dependents of the juvenile court, the court, in
24 order to provide stable, permanent homes for these children, shall
25 review the report as specified in Section 361.5, 366.21, or

1 366.22, shall indicate that the court has read and considered it,
2 shall receive other evidence that the parties may present, and then
3 shall make findings and orders in the following order of
4 preference:

5 (1) Terminate the rights of the parent or parents and order that
6 the child be placed for adoption and, upon the filing of a petition
7 for adoption in the juvenile court, order that a hearing be set. The
8 court shall proceed with the adoption after the appellate rights of
9 the natural parents have been exhausted.

10 (2) On making a finding under paragraph (3) of subdivision
11 (c), identify adoption as the permanent placement goal and order
12 that efforts be made to locate an appropriate adoptive family for
13 the child within a period not to exceed 180 days.

14 (3) Appoint a legal guardian for the child and order that letters
15 of guardianship issue.

16 (4) Order that the child be placed in long-term foster care,
17 subject to the periodic review of the juvenile court under Section
18 366.3.

19 In choosing among the above alternatives the court shall
20 proceed pursuant to subdivision (c).

21 (c) (1) If the court determines, based on the assessment
22 provided as ordered under subdivision (i) of Section 366.21 or
23 subdivision (b) of Section 366.22, and any other relevant
24 evidence, by a clear and convincing standard, that it is likely the
25 child will be adopted, the court shall terminate parental rights and
26 order the child placed for adoption. The fact that the child is not
27 yet placed in a preadoptive home nor with a relative or foster
28 family who is prepared to adopt the child, shall not constitute a
29 basis for the court to conclude that it is not likely the child will
30 be adopted. A finding under subdivision (b) or paragraph (1) of
31 subdivision (e) of Section 361.5 that reunification services shall
32 not be offered, under subdivision (e) of Section 366.21 that the
33 whereabouts of a parent have been unknown for six months or
34 that the parent has failed to visit or contact the child for six
35 months or that the parent has been convicted of a felony
36 indicating parental unfitness, or, under Section 366.21 or 366.22,
37 that the court has continued to remove the child from the custody
38 of the parent or guardian and has terminated reunification
39 services, shall constitute a sufficient basis for termination of
40 parental rights unless the court finds a compelling reason for

determining that termination would be detrimental to the child due to one or more of the following circumstances:

(A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(B) A child 12 years of age or older objects to termination of parental rights.

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(D) The child is living with a relative or foster parent who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her relative or foster parent would be detrimental to the emotional well-being of the child. This subparagraph does not apply to any child who is living with a nonrelative and who is either (i) under six years of age or (ii) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together.

(E) There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.

If the court finds that termination of parental rights would be detrimental to the child pursuant to subparagraph (A), (B), (C), (D), or (E), it shall state its reasons in writing or on the record.

(2) The court shall not terminate parental rights if at each and every hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable

1 efforts were not made or that reasonable services were not
2 offered or provided.

3 (3) If the court finds that termination of parental rights would
4 not be detrimental to the child pursuant to paragraph (1) and that
5 the child has a probability for adoption but is difficult to place for
6 adoption and there is no identified or available prospective
7 adoptive parent, the court may identify adoption as the
8 permanent placement goal and without terminating parental
9 rights, order that efforts be made to locate an appropriate
10 adoptive family for the child within a period not to exceed 180
11 days. During this 180-day period, the public agency responsible
12 for seeking adoptive parents for each child shall, to the extent
13 possible, ask each child who is 10 years of age or older who is
14 placed in a group home for six months or longer from the date
15 the child entered foster care, to identify any individuals, other
16 than the child's siblings, who are important to the child, in order
17 to identify potential adoptive parents. The public agency may ask
18 any other child to provide that information, as appropriate.
19 During the 180-day period, the public agency shall, to the extent
20 possible, contact other private and public adoption agencies
21 regarding the availability of the child for adoption. During the
22 180-day period, the public agency shall conduct the search for
23 adoptive parents in the same manner as prescribed for children in
24 Sections 8708 and 8709 of the Family Code. At the expiration of
25 this period, another hearing shall be held and the court shall
26 proceed pursuant to paragraph (1) or (3) of subdivision (b). For
27 purposes of this section, a child may only be found to be difficult
28 to place for adoption if there is no identified or available
29 prospective adoptive parent for the child because of the child's
30 membership in a sibling group, or the presence of a diagnosed
31 medical, physical, or mental handicap, or the child is the age of
32 seven years or more.

33 (4) (A) If the court finds that adoption of the child or
34 termination of parental rights is not in the best interest of the
35 child, because one of the conditions in subparagraph (A), (B),
36 (C), (D), or (E) of paragraph (1) or in paragraph (2) applies, the
37 court shall either order that the present caretakers or other
38 appropriate persons shall become legal guardians of the child or
39 order that the child remain in long-term foster care. Legal
40 guardianship shall be considered before long-term foster care, if

1 it is in the best interests of the child and if a suitable guardian can
2 be found. A child who is 10 years of age or older who is placed
3 in a group home for six months or longer from the date the child
4 entered foster care, shall be asked to identify any individuals,
5 other than the child's siblings, who are important to the child, in
6 order to identify potential guardians. The agency may ask any
7 other child to provide that information, as appropriate.

8 (B) If the child is living with a relative or a foster parent who
9 is willing and capable of providing a stable and permanent
10 environment, but not willing to become a legal guardian, the
11 child shall not be removed from the home if the court finds the
12 removal would be seriously detrimental to the emotional
13 well-being of the child because the child has substantial
14 psychological ties to the relative caretaker or foster parents.

15 (C) The court shall also make an order for visitation with the
16 parents or guardians unless the court finds by a preponderance of
17 the evidence that the visitation would be detrimental to the
18 physical or emotional well-being of the child.

19 (5) If the court finds that the child should not be placed for
20 adoption, that legal guardianship shall not be established, and
21 that there are no suitable foster parents except exclusive-use
22 homes available to provide the child with a stable and permanent
23 environment, the court may order the care, custody, and control
24 of the child transferred from the county welfare department to a
25 licensed foster family agency. The court shall consider the
26 written recommendation of the county welfare director regarding
27 the suitability of the transfer. The transfer shall be subject to
28 further court orders.

29 The licensed foster family agency shall place the child in a
30 suitable licensed or exclusive-use home that has been certified by
31 the agency as meeting licensing standards. The licensed foster
32 family agency shall be responsible for supporting the child and
33 providing appropriate services to the child, including those
34 services ordered by the court. Responsibility for the support of
35 the child shall not, in and of itself, create liability on the part of
36 the foster family agency to third persons injured by the child.
37 Those children whose care, custody, and control are transferred
38 to a foster family agency shall not be eligible for foster care
39 maintenance payments or child welfare services, except for
40 emergency response services pursuant to Section 16504.

(d) The proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court shall be in the juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, and subdivision (b) of Section 366.22 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding.

(e) The proceeding for the adoption of a child who is a dependent of the juvenile court shall be in the juvenile court if the court finds pursuant to this section that adoption is the appropriate permanent plan and the petition for adoption is filed in the juvenile court. Upon the filing of a petition for adoption, the juvenile court shall order that an adoption hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. The full report required by Section 8715 of the Family Code shall be read and considered by the court prior to the adoption and this shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. *If a petition to adopt has been filed, or if adoption is part of the permanent plan for a child, the court shall receive reports on the progress of these adoptions at no less than six month intervals, beginning with the entry of the order terminating parental rights under this section. If the petition is from the foster parent who has had custody of the child and functioned satisfactorily as a de facto parent for more than one year, and the petition is not opposed by the child or the State Department of Social Services, it shall be granted within 90 days of the exhaustion of the appellate rights of parents, or the department shall show cause why the petition approval shall not be granted.* It is the intent of the Legislature, pursuant to this subdivision, to give potential adoptive parents the option of filing in the juvenile court the petition for the adoption of a child who is a dependent of the juvenile court. Nothing in this section is intended to prevent the filing of a petition for adoption in any other court as permitted by law, instead of in the juvenile court.

(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) In accordance with subdivision (c) of Section 317, if a child before the court is without counsel, the court shall appoint counsel unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) (1) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

(2) In accordance with Section 349, the child shall be present in court if the child or the child's counsel so requests or the court so orders. If the child is 10 years of age or older and is not present at a hearing held pursuant to this section, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire as to the reason why the child is not present.

(3) (A) The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents, if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exist:

(i) The court determines that testimony in chambers is necessary to ensure truthful testimony.

1 (ii) The child is likely to be intimidated by a formal courtroom
2 setting.

3 (iii) The child is afraid to testify in front of his or her parent or
4 parents.

5 (B) After testimony in chambers, the parent or parents of the
6 child may elect to have the court reporter read back the testimony
7 or have the testimony summarized by counsel for the parent or
8 parents.

9 (C) The testimony of a child also may be taken in chambers
10 and outside the presence of the guardian or guardians of a child
11 under the circumstances specified in this subdivision.

12 (i) Any order of the court permanently terminating parental
13 rights under this section shall be conclusive and binding upon the
14 child, upon the parent or parents and upon all other persons who
15 have been served with citation by publication or otherwise as
16 provided in this chapter. After making the order, the court shall
17 have no power to set aside, change, or modify it, but nothing in
18 this section shall be construed to limit the right to appeal the
19 order.

20 (j) If the court, by order or judgment, declares the child free
21 from the custody and control of both parents, or one parent if the
22 other does not have custody and control, the court shall at the
23 same time order the child referred to the State Department of
24 Social Services or a licensed adoption agency for adoptive
25 placement by the agency. However, a petition for adoption may
26 not be granted until the appellate rights of the natural parents
27 have been exhausted. The State Department of Social Services or
28 licensed adoption agency shall be responsible for the custody and
29 supervision of the child and shall be entitled to the exclusive care
30 and control of the child at all times until a petition for adoption is
31 granted, *subject to the continuing jurisdiction of the court in the*
32 *best interests of the child.* ~~With the consent of the agency, the~~
33 ~~The court may appoint a guardian of the child, who shall serve~~
34 ~~until the child is adopted shall ensure representation for the child~~
35 ~~until an adoption is finalized or another permanent placement~~
36 ~~disposition is final.~~

37 (k) Notwithstanding any other provision of law, the
38 application of any person who, as a relative caretaker or foster
39 parent, has cared for a dependent child for whom the court has
40 approved a permanent plan for adoption, or who has been freed

1 for adoption, shall be given preference with respect to that child
2 over all other applications for adoptive placement if the agency
3 making the placement determines that the child has substantial
4 emotional ties to the relative caretaker or foster parent and
5 removal from the relative caretaker or foster parent would be
6 seriously detrimental to the child's emotional well-being.

7 As used in this subdivision, "preference" means that the
8 application shall be processed and, if satisfactory, the family
9 study shall be completed before the processing of the application
10 of any other person for the adoptive placement of the child.

11 (I) (1) An order by the court that a hearing pursuant to this
12 section be held is not appealable at any time unless all of the
13 following applies:

14 (A) A petition for extraordinary writ review was filed in a
15 timely manner.

16 (B) The petition substantively addressed the specific issues to
17 be challenged and supported that challenge by an adequate
18 record.

19 (C) The petition for extraordinary writ review was summarily
20 denied or otherwise not decided on the merits.

21 (2) Failure to file a petition for extraordinary writ review
22 within the period specified by rule, to substantively address the
23 specific issues challenged, or to support that challenge by an
24 adequate record shall preclude subsequent review by appeal of
25 the findings and orders made pursuant to this section.

26 (3) The Judicial Council shall adopt rules of court, effective
27 January 1, 1995, to ensure all of the following:

28 (A) A trial court, after issuance of an order directing a hearing
29 pursuant to this section be held, shall advise all parties of the
30 requirement of filing a petition for extraordinary writ review as
31 set forth in this subdivision in order to preserve any right to
32 appeal in these issues. This notice shall be made orally to a party
33 if the party is present at the time of the making of the order or by
34 first-class mail by the clerk of the court to the last known address
35 of a party not present at the time of the making of the order.

36 (B) The prompt transmittal of the records from the trial court
37 to the appellate court.

38 (C) That adequate time requirements for counsel and court
39 personnel exist to implement the objective of this subdivision.

1 (D) That the parent or guardian, or their trial counsel or other
2 counsel, is charged with the responsibility of filing a petition for
3 extraordinary writ relief pursuant to this subdivision.

4 (4) The intent of this subdivision is to do both of the
5 following:

6 (A) Make every reasonable attempt to achieve a substantive
7 and meritorious review by the appellate court within the time
8 specified in Sections 366.21 and 366.22 for holding a hearing
9 pursuant to this section.

10 (B) Encourage the appellate court to determine all writ
11 petitions filed pursuant to this subdivision on their merits.

12 (5) This subdivision shall only apply to cases in which an
13 order to set a hearing pursuant to this section is issued on or after
14 January 1, 1995.

15 (m) Except for subdivision (j), this section shall also apply to
16 minors adjudged wards pursuant to Section 727.31.

17 SEC. 3. If the Commission on State Mandates determines that
18 this act contains costs mandated by the state, reimbursement to
19 local agencies and school districts for those costs shall be made
20 pursuant to Part 7 (commencing with Section 17500) of Division
21 4 of Title 2 of the Government Code.